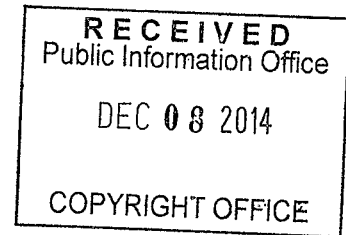


Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.



In The Matter Of:)

Determination of Royalty Rates)
for Digital Performance in Sound)
Recordings and Ephemeral)
Recordings (Web IV))
_____)

14-CRB-0001-WR (2016-2020)

**THE NATIONAL ASSOCIATION OF BROADCASTERS'
OPPOSITION TO SOUNDEXCHANGE'S MOTION TO STRIKE
THE REPLY BRIEFS IN SUPPORT OF iHEARTMEDIA'S
MOTION TO COMPEL SOUNDEXCHANGE TO PROVIDE CERTAIN DISCOVERY**

INTRODUCTION AND SUMMARY

SoundExchange's motion to strike¹ the reply brief submitted by the National Association of Broadcasters ("NAB") in support of iHeartMedia's November 14 motion to compel production of certain documents related to record company promotional activities directed to radio broadcasters² should be denied for the following reasons:

- The reply was proper, as the Copyright Royalty Judges' ("Judges'") rules do not restrict reply briefs to "moving parties" and the only reference to reply briefs of any sort in the Judges' Order Establishing Revised Case Schedule other than reply findings and conclusions provides that "Parties," not the narrower category of "Moving parties," may file them;
- Contrary to SoundExchange's assertions, NAB's reply directly responds to issues that SoundExchange addresses in an entire point heading of its opposition to

¹ SoundExchange's Motion To Strike "Reply" Briefs in Support of iHeartMedia's Motion Filed by National Association of Broadcasters and Sirius XM, filed on December 2, 2014, is cited to herein as "SoundExchange Motion." NAB addresses SoundExchange's motion only insofar as it pertains to NAB. Sirius XM has filed a separate opposition.

² iHeartMedia's Motion To Compel SoundExchange To Produce Documents in Response to Discovery Requests, filed on November 14, 2014, is cited to herein as "iHeartMedia Motion."

iHeartMedia's motion, and SoundExchange concedes that these issues were raised by iHeartMedia's motion (NAB Reply³ Ex. B);

- The relief supported by NAB's reply is fully encompassed by, and is a subset of, the relief requested by iHeartMedia, and SoundExchange's contrary claim that NAB seeks "additional relief" is wrong (SoundExchange Mot. at 3);
- SoundExchange admits that NAB has a right to be heard on this issue (*id.* at 6), but its suggestion that NAB file a second motion to compel addressing arguments raised by SoundExchange's Opposition to the iHeartMedia Motion exalts form over substance and would lead to wasteful, duplicative motions practice.

Documents relating to record companies' efforts to obtain airplay from radio broadcasters on their radio broadcasts and Internet simulcasts of those radio broadcasts and the record companies' views regarding the promotional effect of such airplay are of central importance to NAB, which is participating in this proceeding on behalf of its members that are such radio broadcasters. SoundExchange does not dispute that NAB has a right to be heard on this issue of key importance to its members. The most appropriate vehicle for NAB's arguments to be considered is its reply brief, which was appropriately filed and does not expand the issues or requested relief already before the Court in the context of iHeartMedia's motion.⁴

ARGUMENT

I. NAB'S REPLY IS CONSISTENT WITH THE JUDGES' RULES GOVERNING REPLIES AND ENHANCES JUDICIAL EFFICIENCY BY AVOIDING THE NEED FOR THE JUDGES TO CONSIDER THE SAME REQUESTED RELIEF IN TWO SEPARATE BRIEFING CYCLES.

As an initial matter, the reply is permissible under the Judges' Rules and promotes judicial efficiency. SoundExchange did not – and cannot – point to anything in the Judges' rules

³ "NAB Reply" denotes the Reply of the National Association of Broadcasters in Support of iHeartMedia's Motion To Compel SoundExchange To Provide Discovery Regarding the Record Labels' Promotional Activities Directed to Radio Broadcasters, filed on November 26, 2014.

⁴ In light of the importance of this issue to NAB, NAB is filing a separate motion on December 8 as a protective matter to ensure that it is heard on this important issue, which even SoundExchange concedes would be appropriate. *See* SoundExchange Mot. at 6. NAB will withdraw its separate motion if the Judges deny SoundExchange's Motion To Strike and consider NAB's Reply brief in connection with iHeartMedia's Motion to Compel.

disallowing a non-moving party from submitting a reply brief in conjunction with an issue raised by another party if the opposing party advances arguments in its opposition that directly implicate the non-moving party's interest, which is what happened here. Rather, the rules merely state in general terms that "replies to oppositions shall be filed within four business days of the filing of the opposition," which is exactly what NAB did. *See* 37 C.F.R. § 350.4(f). Similarly, the Judges' Order Establishing Revised Case Schedules sets forth the deadline for filing motions in limine, responses, and replies and provides generally that "Parties," rather than "Moving parties," may file "replies, if any, to motions" by the specified deadline. *See* Order Establishing Revised Case Schedules Ex. A (Aug. 29, 2014).

SoundExchange cites no case law to support its position that in a multi-party proceeding, a party must file a motion (or formally join in a motion) before it may file a reply – even where, as here, the opposition raises issues that directly impact a non-moving party and the non-moving party does not expand the relief sought by the original motion. To the contrary, at least one court has recognized the principle that where the applicable rule governing reply briefs does not explicitly limit replies to moving parties, it is permissible for non-moving parties to submit a reply brief. *See Powell v. Wheelis*, No. Civ. A. CV203-195, 2006 WL 839380, at *1 n.1 (S.D. Ga. Mar. 29, 2006). At issue in *Powell* was a local rule that provided that:

A party intending to file a reply brief ... shall serve and file the reply within eleven (11) calendar days of service of the opposing party's last brief.

Id. In that case, the opposing party had submitted a surreply to the moving party's reply brief within the specified deadline. The court rejected the moving party's attempt to strike that brief, finding that:

By its terms, this rule does not restrict reply briefs to the moving party's initial reply brief. The rule references "a party intending to file a reply brief [.]" not "the moving party[.]" The rule further mandates that service be made within eleven days of the opposing party's "last brief." If the rule were as restrictive as Plaintiff

would have it, it would not have been phrased in such general and permissive terms.

Id. (emphasis added).

In this case, as in *Powell*, the rule governing reply briefs specifies only a deadline for filing them but does not limit who may file them to “moving parties.” Therefore, here, as in *Powell*, the Judges should accept NAB’s reply brief, particularly where, as discussed in Part II, NAB has raised no new issues or requested any additional relief beyond what iHeartMedia previously had requested.

There is another reason why NAB filed – and why the Judges should accept – NAB’s reply brief responding to SoundExchange’s arguments: considering NAB’s position in the context of a motion seeking the same relief enhances judicial efficiency, as it avoids the need for the Judges to undertake the obligation to consider a separate briefing cycle on the same issue. Even SoundExchange concedes (Mot. at 6) that NAB is entitled to be heard on this issue through a separate motion, and NAB is filing such a motion as a protective matter on December 8 to ensure that it is heard regardless of the outcome of SoundExchange’s motion to strike. Nonetheless, it would better conserve judicial and party resources for the Judges to consider NAB’s position in the context of the iHeartMedia motion rather than in a separate briefing cycle, with three additional submissions addressing the same issue of documents relating to the promotional value of performances by radio broadcasters.

If SoundExchange’s position were the law, in every multi-party proceeding, every motion would have to be formally joined (or some pro-forma motion filed) before a non-moving party could respond to arguments raised in an opposition – regardless of whether those arguments directly affect the non-moving party’s interest in the case. In short, SoundExchange’s “form over substance” position would lead to a proliferation of motion filings that would unnecessarily

burden the courts and increase the costs of litigation. To avoid such a result, NAB filed its focused Reply and confined its requested relief to a subset of the relief sought by iHeartMedia in its motion.

II. NAB'S REPLY DOES NOT RAISE NEW ISSUES OR SEEK ADDITIONAL RELIEF APART FROM THAT REQUESTED BY IHEARTMEDIA.

In addition to the procedural propriety of NAB's reply, the reply is substantively proper, as it does not raise "new issues" or seek "additional relief," as SoundExchange incorrectly claims. SoundExchange Mot. at 3-6. Rather, the dispute regarding the production of documents related to attempts to obtain terrestrial radio airplay was already raised by iHeartMedia in its motion and opposed by SoundExchange, and the relief supported by NAB is simply a subset of the relief sought by iHeartMedia.

iHeartMedia expressly sought documents "that address the promotional value of airplay on terrestrial radio, efforts to obtain such airplay, and that compare or contrast terrestrial radio and non-interactive services." iHeartMedia Mot. at 15. SoundExchange opposed that request, dedicating an entire point heading in its opposition to its claim that "Terrestrial Radio Is Not Directly Related to SoundExchange's Written Direct Statement." SoundExchange's Opp'n to iHeartMedia's Mot. To Compel SoundExchange To Produce Documents in Resp. to Discovery Requests 19-20 (Nov. 21, 2014) ("SoundExchange's iHeartMedia Opp'n"). It asserted that the "promotional or substitution effects of the use of webcasting services by the public" was relevant but that "[w]hether terrestrial radio does or does not promote other streams of revenue is beside the point." *Id.* at 19. NAB's reply merely refutes SoundExchange's contention.

Even the specific statements that SoundExchange claims are "new" do not justify granting SoundExchange the relief it seeks. For example, SoundExchange identifies as new NAB's statement that SoundExchange "agreed to produce an additional category of documents

that relate exclusively to terrestrial radio,” but that observation refers to SoundExchange’s agreement to produce marketing and promotional plans for the top 10 grossing projects from each of the major record companies. *See* SoundExchange Mot. at 2-3; NAB Reply at 10-11. SoundExchange itself explicitly advised NAB that the “issue of the Services’ requests concerning promotional plans that relate *exclusively* to terrestrial radio is before the Judges in iHeart’s motion to compel.” NAB Reply Ex. B at 1 (Nov. 21, 2014 email from SoundExchange counsel Rose Ehler to NAB counsel Bruce Joseph) (second emphasis added). Thus, SoundExchange’s own words belie its claim that this issue is “new.”

SoundExchange also objects to NAB’s commonsense observation that record companies’ efforts to obtain airplay on terrestrial radio equally result in play on radio simulcast services, which transmit identical programming, as a purported new argument. SoundExchange Mot. at 2. But that observation directly rebuts SoundExchange’s assertion in its opposition that “[t]he two formats are not the same and should not be so easily conflated.” SoundExchange’s iHeartMedia Opp’n at 19.⁵ NAB’s statement that Messrs. Harleston and Kooker discuss and quantify their promotional expenditures, including those directed at terrestrial radio, similarly responds to SoundExchange’s claim that “Terrestrial Radio Is Not Directly Related to SoundExchange’s Written Direct Statement.” SoundExchange Opp’n at 19-20. Messrs. Harleston and Kooker submitted testimony as part of SoundExchange’s written direct statement that broadly discusses record companies’ various activities aimed at promoting their sound recordings and quantifies the expenditures associated with those activities. In light of the responsive nature of NAB’s

⁵ It is noteworthy that SoundExchange’s own witness in this proceeding, Aaron Harrison of Universal Music Group, has submitted sworn testimony to the Judges in another proceeding that directly undermines SoundExchange’s suggestion that terrestrial radio promotion has nothing to do with radio simulcast promotion, admitting that “people who work in the promotions department” welcome all forms of promotion on all platforms. “Their function is to promote records, and in carrying out their duties, they are agnostic about the platform on which the records are gaining attention or spins.” Rebuttal Test. of Aaron Harrison, Docket No. 2011-1 CRB PSS/Satellite II at 11 (July 2, 2012) (emphasis added), <http://www.loc.gov/crb/proceedings/2011-1/>.

reply, SoundExchange's contention that the NAB Reply is a "sandbag" and violates the "[p]rinciples of fundamental fairness" and "due process" (SoundExchange Mot. at 1, 4) is baseless.

The proper scope of reply arguments was recently addressed in *Calderon v. Experian Info. Solutions, Inc.*, 290 F.R.D. 508 (D. Idaho 2013). The court explained:

The purpose of Mr. Calderon's Reply Brief was to respond to EIS's Opposition to his Second Motion to Compel. A reply necessarily raises facts and issues, for the first time, that are germane to the opposition. If the evidence and argument included with a motion were required to anticipate the arguments a respondent might raise in opposition to the motion, the court would not permit the movant to file a reply to any opposition. Here, EIS has not been sandbagged, as Mr. Calderon, in his Reply Brief, responded to defensive issues put in play by EIS's opposition. As such, Mr. Calderon did not waive the ability to argue that the employees of ESC are managing agents of EIS, and the Magistrate Judge did not err in refusing to consider EIS's post-hearing submissions (Dkts. 48, 50).

Calderon, 290 F.R.D. at 515 (citations and quotation marks omitted). Here, NAB has simply addressed issues that are "germane to [SoundExchange's] opposition."

Nor does NAB seek additional relief beyond that already sought by iHeartMedia, as SoundExchange incorrectly claims. iHeartMedia requested an order compelling SoundExchange to:

- (1) "search the files of record labels' promotional departments – or, at a bare minimum, the files of the key personnel who oversee those departments [identified on page 7 of its motion] and to produce non-privileged documents responsive to the Services['] RFP Nos. 14, 15, 16, 28, 29, 49, 56, 57, and 58"; and
- (2) "search for and produce non-privileged documents responsive to those same requests that address the promotional value of airplay on terrestrial radio, efforts to obtain such airplay, and that compare or contrast terrestrial radio and non-interactive services."

iHeartMedia Mot. at 15. NAB argued in favor of four specific categories of documents in its reply. Each such category was fully encompassed by – and in some cases narrower than – the very same documents that iHeartMedia sought by identifying numbered requests, and, indeed,

NAB expressly cross-referenced each of its requests to the underlying document requests as to which iHeartMedia sought production. Specifically, NAB sought:

- “Documents that study or analyze the existence or non-existence of a substitutional or promotional effect of terrestrial radio on other sources of record company revenue,” cross-referencing Licensee RFPs⁶ 14, 15, 28, and 56 and virtually duplicating Licensee RFP 14;
- “Documents that discuss record label strategy in promoting their recordings to radio broadcasters,” cross-referencing Licensee RFPs 14, 15, and 56 (which seek, *inter alia*, analyses, research, presentations, or memoranda regarding the promotional effect of terrestrial radio airplay);
- “Reports that discuss the reasons for or effect of such promotion,” cross-referencing Licensee RFPs 14, 15, and 56 (which seek analyses, research, presentations, or memoranda regarding the existence or nonexistence of a promotional effect of terrestrial radio airplay); and
- “Marketing plans or promotion plans for the top ten grossing artists represented or affiliated with each witness’s company, including efforts to obtain radio play of the artists’ recordings and the effect of such airplay,” cross-referencing and duplicating Licensee RFP 16.

NAB Reply at 4 and 12. Given that NAB’s focused request for relief is already encompassed by iHeartMedia’s broader requests, SoundExchange has nothing to complain about. NAB’s reply brief should be considered.⁷

CONCLUSION

For the foregoing reasons, SoundExchange’s Motion to Strike NAB’s reply should be denied. Nevertheless, in an abundance of caution, and to protect NAB’s independent right to be heard on this critical issue, NAB is filing a separate motion to compel addressing this issue on

⁶ “Licensee RFP” denotes Licensee Participants’ First Set of Requests for Production of Documents to SoundExchange (Oct. 13, 2014), which was attached as Exhibit C to iHeartMedia’s Motion.

⁷ SoundExchange’s characterization of NAB’s position regarding discovery directed at NAB (SoundExchange Mot. at 6 n.3) is not only irrelevant but false. SoundExchange filed a Motion To Compel NAB To Produce Certain Financial Documents on December 1, 2014. Rather than burden the Judges with additional arguments here, NAB will address the specific issues raised in SoundExchange’s Motion To Compel in its opposition to that motion, which it will file on December 8.

Monday, December 8, if the Judges decide that such a motion is necessary. Of course, if the Judges deny SoundExchange's motion to strike and consider NAB's reply brief in the context of iHeartMedia's motion, NAB's separate motion would become moot.

Respectfully submitted,

December 8, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, I caused copies of the foregoing document to be served via email on the following parties, which have consented to email service:

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